

# **EXHIBIT 9**

1

13:12:40

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

APPLE, INC., )  
 )  
 Plaintiff, )  
 ) C.A. No. 22-1377 (MN)  
 v. )  
 )  
 MASIMO CORPORATION, et al., )  
 )  
 Defendants. )

Wednesday, December 21, 2022  
 2:00 p.m.  
 Teleconference

844 King Street  
 Wilmington, Delaware

BEFORE: THE HONORABLE MARYELLEN NOREIKA  
 United States District Court Judge

## APPEARANCES:

POTTER ANDERSON & CORROON, LLP  
 BY: DAVID ELLIS MOORE, ESQ.

-and-

DESMARAIS LLP  
 BY: JOHN M. DESMARAIS, ESQ.  
 BY: PETER C. MAGIC, ESQ.

Counsel for the Plaintiff

3

14:00:39 1 client representatives from Apple on the line as well. We  
 14:00:43 2 have Colette Mayer, Ryan Moran and Natalie Post.  
 14:00:47 3 THE COURT: All right. Good afternoon to all of  
 14:00:49 4 you.  
 14:00:50 5 Let me just start by saying we have reviewed the  
 14:00:52 6 papers. There was some back and forth in the papers  
 14:00:55 7 regarding whether or not you all had met and conferred. So  
 14:01:00 8 I want to start by confirming that you have met and  
 14:01:03 9 conferred. Plaintiff noted that there was a possible  
 14:01:06 10 agreement in the works with regard to interrogatories or  
 14:01:08 11 something of that sort. Where are we currently on this  
 14:01:12 12 request for discovery?  
 14:01:13 13 MR. MAGIC: Yes, Your Honor, this is Peter  
 14:01:17 14 Magic. That's correct, we had tried to work out an  
 14:01:20 15 agreement about having the defendants answer at least the  
 14:01:26 16 interrogatory part of what we requested, what Apple has  
 14:01:30 17 requested. We appear to be reaching an agreement there, but  
 14:01:35 18 I am not sure that it actually went all the way. I last  
 14:01:39 19 inquired a few days ago as to whether we would be getting  
 14:01:44 20 responses before the hearing and I guess I don't have any  
 14:01:47 21 commitment on that part. So I'll let defendants' counsel  
 14:01:52 22 speak to that.  
 14:01:53 23 But I am not sure that we have a firm commitment  
 14:01:56 24 from them to respond on the interrogatories. But we  
 14:02:00 25 certainly got close. And perhaps defense counsel will tell

2

## 1 APPEARANCES CONTINUED:

2  
 3 PHILLIPS McLAUGHLIN & HALL, P.A.  
 4 BY: JOHN C. PHILLIPS, JR., ESQ.

5 -and-

6 KNOBBE MARTENS  
 7 BY: BRIAN HORNE, ESQ.  
 8 BY: STEVE JENSEN, ESQ.

9 Counsel for the Defendants

10 -----

13:52:11

11 THE COURT: Good afternoon, counsel. Who is  
 12 there, please?  
 13 MR. MOORE: Good afternoon, Your Honor. On  
 14 behalf of the plaintiff, Dave Moore from Potter Anderson.  
 15 And I am joined by my co-counsel from Desmarais LLP, John  
 16 Desmarais and Peter Magic.  
 17 THE COURT: Good afternoon.  
 18 MR. PHILLIPS: Good afternoon, Your Honor. This  
 19 is Jack Phillips on behalf of the defendant. With me on the  
 20 phone are Brian Horne and Steve Jensen of the Knobbe firm.  
 21 THE COURT: All right. Good afternoon to you as  
 22 well.  
 23 Anyone else on the line?  
 24 MR. MAGIC: Yes, Your Honor. Peter Magic from  
 25 the Desmarais firm. I want to let you know we have three

4

14:02:03 1 me that they are committed to doing so now. But I just  
 14:02:07 2 don't have that to report to Your Honor at the moment.  
 14:02:10 3 THE COURT: All right. Let me hear from the  
 14:02:13 4 defense counsel. Where are we on that?  
 14:02:15 5 MR. HORNE: Good afternoon, Your Honor. Brian  
 14:02:17 6 Horne from Knobbe for Masimo.  
 14:02:20 7 The parties negotiated first the scope of the  
 14:02:23 8 interrogatories. I think we have reached agreement on the  
 14:02:26 9 scope. The problem was our proposal was that we would  
 14:02:30 10 respond to the interrogatories if it would resolve the  
 14:02:33 11 motion and Apple wouldn't commit to that and wanted to  
 14:02:36 12 proceed even if they got interrogatory responses, they  
 14:02:39 13 wanted to proceed to request documents and a deposition. So  
 14:02:44 14 we will respond to the interrogatories at the appropriate  
 14:02:47 15 time if we can't resolve this motion.  
 14:02:49 16 THE COURT: Okay. A couple of other questions I  
 14:02:57 17 had. For the plaintiff, you argue that there is an urgent  
 14:03:01 18 need to file your preliminary injunction motion. This case  
 14:03:04 19 has been pending for over two months and I don't see a  
 14:03:07 20 motion yet. Are you planning on filing one?  
 14:03:11 21 MR. MAGIC: Your Honor, yes. Based on  
 14:03:15 22 everything we know at the time of the expedited discovery  
 14:03:20 23 motion, there is enough there for us to move if we don't get  
 14:03:24 24 the discovery. So we know that Masimo's CEO has made  
 14:03:30 25 certain representations about what his intent is with the

5

14:03:33 1 product that it released and its intent is to capture as  
 14:03:37 2 much market share as it can. And it acquired a company for  
 14:03:40 3 a billion dollars to try to make good on that. So while we  
 14:03:43 4 would certainly prefer to have the discovery first, the  
 14:03:51 5 idea, the hope was that we would have discovery first, but  
 14:03:55 6 we do have sufficient basis to go forward if we, you know,  
 14:04:00 7 can't get that --  
 14:04:02 8 THE COURT: Let's say I don't give you the  
 14:04:03 9 discovery. When are you planning to file?  
 14:04:07 10 MR. MAGIC: I think that the best I could tell  
 14:04:10 11 you there is we could proceed in January to file.  
 14:04:15 12 THE COURT: Okay. Well, you're the one that's  
 14:04:18 13 going to have to convince me that you're being irreparably  
 14:04:23 14 harmed and every bit of delay seems like it's working  
 14:04:26 15 against you. Does the information you're seeking really  
 14:04:30 16 strengthen the motion to such an extent that you need this  
 14:04:34 17 discovery?  
 14:04:35 18 MR. MAGIC: Well, it certainly could, Your  
 14:04:37 19 Honor, that's why we are seeking it. We won't know until we  
 14:04:41 20 get it is the basic answer to that question.  
 14:04:44 21 THE COURT: All right. Well, it seems to me  
 14:04:46 22 that the more prudent course would have been to file a  
 14:04:49 23 motion and then to try to get discovery. Lots of courts say  
 14:04:53 24 when there is no motion for a preliminary injunction filed  
 14:04:57 25 and no hearing pending that expedited discovery isn't

6

14:05:04 1 warranted. Why shouldn't I follow that?  
 14:05:06 2 MR. MAGIC: Your Honor, I don't think that there  
 14:05:08 3 is any sort of binding authority in that regard as to  
 14:05:12 4 whether that's a course of action Your Honor would have to  
 14:05:15 5 take.  
 14:05:15 6 THE COURT: I didn't ask if I had to take it,  
 14:05:18 7 I'm saying why doesn't it make sense? You all think you  
 14:05:22 8 have such a great case that you can get a preliminary  
 14:05:26 9 injunction. It just seems to me that you're asking for this  
 14:05:29 10 discovery, a lot of which seems like it's based on  
 14:05:32 11 speculation about someone doing something with your  
 14:05:38 12 confidential information, and I don't know, I mean, it just  
 14:05:42 13 seems to me that those cases are persuasive, so tell me why  
 14:05:48 14 I shouldn't be persuaded.  
 14:05:51 15 MR. MAGIC: Sure. Your Honor, let's break it  
 14:05:53 16 into the two areas that we're looking at. Right? So there  
 14:05:57 17 is two areas of discovery, one of them you just touched on,  
 14:06:00 18 the other one is the -- relates to Masimo's distribution  
 14:06:05 19 capability to actually distribute the product and market.  
 14:06:09 20 So --  
 14:06:10 21 THE COURT: It's been two months now. Have they  
 14:06:13 22 started distributing it in a way that you're fearful it's  
 14:06:17 23 going to bring down Apple's watch business?  
 14:06:21 24 MR. MAGIC: No, not presently, Your Honor,  
 14:06:24 25 certainly not. But the idea is that a preliminary

7

14:06:29 1 injunction is a tool for looking prospectively. So if we  
 14:06:35 2 have the additional information, that could certainly be  
 14:06:39 3 relevant, the additional information about Masimo's  
 14:06:43 4 distribution capabilities for the product and its plans for  
 14:06:46 5 the future in that regard would certainly be relevant to the  
 14:06:49 6 prospective potential for irreparable harm. That's why we  
 14:06:55 7 seek it. Your Honor is correct, at the moment it doesn't  
 14:06:59 8 appear that the product has started to move in significant  
 14:07:02 9 numbers.  
 14:07:02 10 THE COURT: Let me ask the defendants a couple  
 14:07:04 11 of questions. Your briefing didn't focus much on the big  
 14:07:07 12 cost factors that I'm supposed to be focused on in looking  
 14:07:11 13 at this issue. Why don't you tell me now under that statute  
 14:07:14 14 -- why under that standard I should deny the motion.  
 14:07:18 15 MR. HORNE: Two things, Your Honor. The good  
 14:07:20 16 cause argument on the Jensen discovery was based on some  
 14:07:25 17 speculation that Mr. Jensen has done something wrong while  
 14:07:30 18 they admit they have no evidence he's done anything wrong.  
 14:07:33 19 I think Mr. Magic used the word "could." You mentioned  
 14:07:38 20 speculation. We consider this a fishing expedition. Mind  
 14:07:42 21 you they've had mountains of discovery --  
 14:07:45 22 THE COURT: Go to the distribution channel one.  
 14:07:47 23 I understand what you're saying on the one about Mr. Jensen,  
 14:07:53 24 you could probably say that in most cases, right, could be  
 14:07:56 25 someone did something wrong, so I'm not persuaded on that

8

14:07:59 1 one. Tell me about the distribution channel.  
 14:08:02 2 MR. HORNE: In our conference with counsel that  
 14:08:04 3 we had after Apple filed its motion, we explained that  
 14:08:07 4 Masimo was selling the watch through its website and there  
 14:08:12 5 is no imminent plans for a blitzkrieg next week through the  
 14:08:17 6 distribution channels that we've acquired.  
 14:08:19 7 Their reasoning for the need were twofold. One,  
 14:08:26 8 Mr. Kiani's statement in the earnings call that Masimo hopes  
 14:08:29 9 or believes their watch should command a hundred percent of  
 14:08:33 10 the market. I don't think Apple can say with a straight  
 14:08:36 11 face they believe that Masimo is going to conquer a hundred  
 14:08:40 12 percent of the smartwatch market next quarter. That's not  
 14:08:44 13 what he said, that's not what he meant. I just don't think  
 14:08:47 14 Apple believes that. I don't believe they can say that with  
 14:08:52 15 a straight face.  
 14:08:54 16 THE COURT: What about the burden, what kind of  
 14:08:56 17 burden is this? You kind of agreed that you give some  
 14:09:00 18 information in interrogatory, I understand that why you  
 14:09:03 19 would want to say look, that's all we're going to agree to  
 14:09:06 20 give you and if we have to go through the process of going  
 14:09:09 21 before the Court, we want to be able to impose everything,  
 14:09:12 22 but it doesn't seem in terms of burden that the  
 14:09:15 23 interrogatory responses would be too bad because you seem  
 14:09:18 24 willing to give those. Is that not right?  
 14:09:21 25 MR. HORNE: Yes, Your Honor, that's fine with

9

14:09:23 **1** us. And especially on the distribution interrogatory, I  
 14:09:26 **2** think we could get a response to that interrogatory in a few  
 14:09:29 **3** weeks, especially given the holidays. And I think that  
 14:09:32 **4** should resolve it completely.  
 14:09:35 **5** THE COURT: All right. And then --  
 14:09:39 **6** MR. MAGIC: Your Honor, may I be heard?  
 14:09:41 **7** THE COURT: Yes, go ahead.  
 14:09:42 **8** MR. MAGIC: Your Honor, I was only going to  
 14:09:45 **9** briefly make sure that the facts are out there as to the  
 14:09:48 **10** other discovery requests relating to Mr. Jensen. And I just  
 14:09:52 **11** don't want it to get lost in the shuffle --  
 14:09:55 **12** THE COURT: But my problem with that is it  
 14:09:57 **13** didn't seem like your requests were narrowed to Mr. Jensen.  
 14:10:01 **14** Based on the briefing it seemed like he was the only person  
 14:10:03 **15** you were concerned with. But are your requests really  
 14:10:07 **16** focused solely on him?  
 14:10:09 **17** MR. MAGIC: Yes, we're willing to narrow --  
 14:10:11 **18** we're willing to make that clearer than it was.  
 14:10:14 **19** THE COURT: Okay. But you want me to grant a  
 14:10:16 **20** motion to give you expedited discovery that you have asked  
 14:10:20 **21** for, now you're going and saying wait, we'll take something  
 14:10:24 **22** narrower. If you were coming in for expedited discovery,  
 14:10:28 **23** shouldn't you have asked for what you actually wanted to  
 14:10:31 **24** support with me?  
 14:10:32 **25** MR. MAGIC: Correct. Yes. And I think our

10

14:10:34 **1** briefing was pretty laser focused on Mr. Jensen and so  
 14:10:39 **2** hopefully that was clear enough in terms of how we argued  
 14:10:43 **3** the need. But yes, understood, Your Honor. I only wanted  
 14:10:47 **4** to make sure that the facts didn't get lost in the shuffle  
 14:10:50 **5** that this individual did have access to Apple confidential  
 14:10:55 **6** information for a year-and-a-half while the W1 watch that  
 14:10:59 **7** was eventually released and has an eerily similar design to  
 14:11:04 **8** the Apple watch, while all that was under development,  
 14:11:08 **9** Mr. Jensen was on the board of the R & D arm of Masimo, so  
 14:11:12 **10** we're not --  
 14:11:13 **11** THE COURT: But really that's all you have. All  
 14:11:15 **12** you have is that someone who had access was on the board.  
 14:11:20 **13** Is that what you're telling me? Apple watches are kind of  
 14:11:23 **14** out there, aren't they, in the public?  
 14:11:26 **15** MR. MAGIC: Correct. Yes, the watches are  
 14:11:28 **16** certainly out there in the public.  
 14:11:30 **17** THE COURT: So what is -- tell me something  
 14:11:32 **18** other than the fact that he had access and he was on the  
 14:11:37 **19** board. Do you have anything else that makes this something  
 14:11:42 **20** other than a fishing expedition? There were lots of people  
 14:11:46 **21** who had access to confidential information I'm guessing.  
 14:11:50 **22** What reason do you have, give me some basis to say maybe  
 14:11:53 **23** Mr. Jensen intentionally or unintentionally divulged  
 14:12:00 **24** confidential information, what do you have?  
 14:12:02 **25** MR. MAGIC: Sure. Sure. One, I would say it is

11

14:12:05 **1** unusual for somebody who has confidential information from a  
 14:12:08 **2** litigation to serve on the board of a company that's coming  
 14:12:11 **3** out with a product that looks like the company that sues for  
 14:12:17 **4** the product. In terms of specifics, you know, we did attach  
 14:12:21 **5** to Apple's reply brief several of the documents that Apple  
 14:12:26 **6** produced in the other litigation that drill into  
 14:12:30 **7** confidential information about specific materials that are  
 14:12:33 **8** used in that part of the Apple watch, and specific vendors  
 14:12:39 **9** that are employed to produce that material, or produce those  
 14:12:44 **10** parts. So there is business information there that could be  
 14:12:47 **11** relevant to making decisions about whether to make a product  
 14:12:50 **12** that comes out and looks similar to the Apple watch. But,  
 14:12:57 **13** in fact, it's pretty much a copy of that design, that aspect  
 14:13:00 **14** of the Apple watch. So that's what we pointed to. I agree  
 14:13:04 **15** Your Honor, that we don't have a smoking gun or anything  
 14:13:07 **16** like that, but it seems more than a typical situation.  
 14:13:10 **17** THE COURT: All right. I have before me  
 14:13:13 **18** plaintiff's motion to expedite discovery for information  
 14:13:16 **19** relevant to a potential motion for a preliminary injunction.  
 14:13:19 **20** A motion that has not been filed. Apple seeks information  
 14:13:22 **21** related to one, defendants' distribution channels for the  
 14:13:25 **22** sale of the W1; and two, alleged possible misuse of Apple's  
 14:13:31 **23** confidential information produced in prior litigation.  
 14:13:34 **24** Apple argues that the information would be  
 14:13:36 **25** relevant to irreparable harm and balance of the equity.

12

14:13:40 **1** Courts in this district have applied a good cause standard  
 14:13:44 **2** in accepting requests for expedited discovery. Under the  
 14:13:48 **3** standard, I must weigh the need for discovery with the  
 14:13:49 **4** breadth of the discovery request and the prejudice to the  
 14:13:52 **5** responding parties. Courts consider one, the timing and  
 14:13:55 **6** context of the discovery requests; two, the scope and  
 14:13:58 **7** purpose of the request; and three, the nature of the burden  
 14:14:01 **8** on the respondents.  
 14:14:02 **9** Plaintiff argues that it showed good cause  
 14:14:04 **10** because it has an urgent need to file a preliminary  
 14:14:07 **11** injunction motion given that defendants' product was  
 14:14:10 **12** introduced to the market this past August, and because the  
 14:14:14 **13** requests are narrowly tailored to issues relevant to the  
 14:14:20 **14** preliminary injunction and because the burden on defendants  
 14:14:23 **15** will be minimal.  
 14:14:25 **16** I disagree. I find that plaintiff has failed to  
 14:14:27 **17** show good cause to expedite discovery at this juncture and  
 14:14:31 **18** therefore deny plaintiff's motion.  
 14:14:34 **19** First, plaintiff has not yet filed a motion for  
 14:14:37 **20** preliminary injunction which waives expediting discovery.  
 14:14:40 **21** Furthermore, it is not clear that the information requested  
 14:14:40 **22** would strengthen plaintiff's potential motion to such an  
 14:14:45 **23** extent that expedited discovery is warranted before  
 14:14:47 **24** plaintiff has even filed the motion.  
 14:14:50 **25** Some of the information requested regarding the

13

14:14:52 **1** alleged misuse of confidential information appears to be  
 14:14:55 **2** based on mere speculation. In addition, there is a pending  
 14:14:58 **3** motion to dismiss requesting that I dismiss found united as  
 14:15:02 **4** a defense in this case. I also have concerns that the  
 14:15:04 **5** discovery requested is substantially broader than what may  
 14:15:08 **6** be relevant. A need for the requested discovery at this  
 14:15:11 **7** stage thus does not justify imposing the burden of  
 14:15:14 **8** expediting discovery on defendants. So the motion is  
 14:15:17 **9** denied.  
 14:15:17 **10** That being said, I think that there has been a  
 14:15:21 **11** reasonable attempt to get some of the information that the  
 14:15:25 **12** plaintiff may need out there in the form of interrogatories,  
 14:15:30 **13** and so I guess my question for defendant is can you abide by  
 14:15:40 **14** what you had previously agreed to do?  
 14:15:45 **15** MR. HORNE: Yes, Your Honor, that agreement was  
 14:15:47 **16** on a distribution channel to provide interrogatory response.  
 14:15:51 **17** I said a few weeks. I think three weeks would be fair given  
 14:15:55 **18** the holidays.  
 14:15:56 **19** THE COURT: All right. Then even though I have  
 14:15:59 **20** denied the motion, I will order that the defendants produce  
 14:16:03 **21** that information, but no other information at this point.  
 14:16:08 **22** Anything else that we need to discuss while  
 14:16:11 **23** we're on the phone?  
 14:16:14 **24** MR. HORNE: No, Your Honor. I just want to be  
 14:16:16 **25** clear. Respond to the interrogatory, I thought that was

14

14:16:19 **1** clear on the record, I wanted to make sure.  
 14:16:23 **2** THE COURT: Anything else? All right. Thank  
 14:16:28 **3** you everyone.  
 14:16:28 **4** MR. MAGIC: Nothing from Apple, Your Honor.  
 14:16:30 **5** Thank you.  
 14:16:31 **6** THE COURT: Enjoy the holidays.  
**7** (Teleconference concluded at 2:16 p.m.)  
**8**  
**9** I hereby certify the foregoing is a true and  
 accurate transcript from my stenographic notes in the proceeding.  
**10**  
**11** /s/ Dale C. Hawkins  
 Official Court Reporter  
**12** U.S. District Court  
**13**  
**14**  
**15**  
**16**  
**17**  
**18**  
**19**  
**20**  
**21**  
**22**  
**23**  
**24**  
**25**